LADD PETROLEUM CORP.

IBLA 82-1220, 82-1347 Decided January 28, 1983

Appeals from decisions of Montana State Office, Bureau of Land Management, returning, unapproved, partial assignments of oil and gas leases M 47790 (SD) and M 47794 (SD).

Reversed and remanded.

1. Oil and Gas Leases: Assignments or Transfers

> Where a partial assignment of an oil and gas lease was filed with the Bureau of Land Management several months before the anniversary date of the lease by a qualified entity, and where the rental for the assigned acreage was timely paid by the putative assignee, the assignment may be approved by BLM after termination of the base lease for nonpayment of the full lease rental on the anniversary date of the lease.

APPEARANCES: Virgil C. McClintock, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Effective June 1, 1981, the Montana State Office, Bureau of Land Management (BLM), issued noncompetitive oil and gas leases M 47790 (SD) for 2,109.21 acres in T. 7 S., R. 5 E., Black Hills meridian, and M 47794 (SD) for 1,200 acres in T. 7 S., R. 4 E., both in Fall River County, South Dakota, to John H. Messinger.

On August 10, 1981, Ladd Petroleum Corporation (Ladd) filed, for approval by BLM, partial assignments from each lease: 1,229 acres in lease M 47790 (SD), and 1,000 acres in lease M 47794 (SD).

The statute, 30 U.S.C. § 187 (1976), provides that Federal oil and gas leases may not be assigned except with permission of the Secretary of the Interior. 30 U.S.C. § 187a (1976) provides that, subject to the final approval of the Secretary, partial assignments of oil and gas leases may be made, and such assignments will take effect on the first day of the month

following the filing of all necessary documents in the proper BLM office (the documents include three original executed counterparts of the assignment, showing qualifications of the assignee, and where required, an adequate lease bond). The Secretary shall disapprove any assignment only for lack of qualification of the assignee or for lack of sufficient bond. As neither of the disqualifying conditions existed in its case, Ladd reasonably assumed the assignments would be approved by BLM effective September 1, 1981.

Ladd, being aware of the rental requirements for Federal oil and gas leases, and not having received the approved assignments, on May 11, 1982, tendered to BLM payments of $1,229 for lease M 47790 (SD), and $1,000 for lease M 47794 (SD). BLM had not acted upon the requests for approval of the partial assignments, and its reaction to the rental payments was to notify Messinger that failure to pay the additional rental required for each base lease by June 1, 1982, would result in automatic termination of the leases. Messinger did not pay the additional rental, so by decision of July 14, 1982, BLM returned the unapproved partial assignment from M 47790 (SD), and by decision of August 18, 1982, returned the unapproved partial assignment from M 47794 (SD), advising Ladd in each case that, as the base lease had terminated June 1, 1982, for failure to pay the rental then due, the assignment could not be approved. Ladd appealed each decision.

On appeal, Ladd argues that BLM's actions are contrary to applicable law and regulation, are affronts to all concepts of equity, fairness, and justice, and are arbitrary and capricious. Ladd states that BLM took no action on its requests for approval for almost 10 months prior to June 1, 1982, and then did not notify Ladd until the middle of July as to M 47790 (SD), and the middle of August as to M 47794 (SD). Ladd contends its requests for approval of the partial assignments was a request for segregation of the assigned lands into a separate lease in each case. BLM's failure to act timely was a failure to perform a simple ministerial duty with the result that Ladd has suffered substantial injury and loss as the direct and proximate result of such failure.

BLM has responded, stating simply that the oil and gas lease filings and assignments have increased dramatically in the past 2 years; that it has a shortage of trained adjudicators in the oil and gas lease division; that the BLM Director's Office had directed an immediate reduction in the backlog of oil and gas lease offers so that the adjudication activities had been directed toward lease issuance rather than toward approval of assignments; and that there was a 15-month backlog of unapproved assignments at the end of fiscal year 1981.

It is difficult to disagree with the contentions of Ladd in these cases. Ladd is qualified to hold Federal oil and gas leases, and no bond coverage is required on either lease at this time.

[1] In Jones-O'Brien, Inc., 85 I.D. 89 (1978), the Secretary held that an oil and gas lease which had expired may be retroactively suspended where an application for suspension was pending at the time of expiration of the lease. By analogy, where an application from a qualified entity for approval of a partial assignment of an oil and gas lease was pending in BLM

several months prior to the anniversary date of the lease, and where the rental for the portion of the lease described in the partial assignment was timely tendered by the putative assignee, the partial assignment may be retroactively approved. As the Secretary said in Jones-O'Brien, "an application filed before the lease expires can be viewed as preserving the right of the Department to act on the application." 85 I.D. at 95. 1/

The Montana State Office, BLM, is instructed to recall the assignment forms from appellant, and to approve the assignments effective September 1, 1981, all else being regular.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed are reversed and the cases remanded to BLM for further action consistent with this opinion.

_____
Douglas E. Henriques
Administrative Judge

I concur:

_____
Franklin D. Arness
Administrative Judge
Alternate Member

1/ The dissent assumes, without citation to authority, that the annual termination date or the date the rental payment was due on the principal lease must be the focal point of analysis in this case. Here, however, the assignment was filed with BLM 10 months prior to the date when the lease rental was next due. Appellant timely presented payment for the assigned portion of the leases. Payment was not rejected until July and August 1982, a year after the assignment was filed with BLM. By giving retroactive approval to the assignment, the circumstance of termination is avoided and the question which troubles the dissenter of who is eligible to petition for reinstatement simply does not arise. It should be noted in this connection that the reasoning which both underlies the dissent in this case and the cited authority ultimately relied upon by the dissent, Amoco Production Co., 16 IBLA 215 (1974), employ the same reasoning as did Duncan Miller, 6 IBLA 283, 284 (1972), overruled in Jones-O'Brien, Inc., 85 I.D. 89, 96 n.10 (1978). Duncan Miller held the Secretary was without authority to grant a retroactive suspension of a lease after the expiration of the lease term in the absence of express authority to take such an action. As the Secretary's opinion indicates in Jones-O'Brien, Inc., supra, the power of the Secretary to give retroactive approval to applications for action upon leases in cases where there is a proper application pending before him prior to the termination of the lease is not extinguished by the expiration of the lease term. Grace Petroleum Corp., 62 IBLA 180 (1982), cited by the dissent, is not in point since that case involved a lease assignment filed with BLM after the termination of the principal lease for nonpayment of rent.

ADMINISTRATIVE JUDGE FRAZIER DISSENTING:

An oil and gas lease on which there is no well capable of producing oil or gas in paying quantities terminates by operation of law if the annual rental payment is not received in the proper office of BLM on or before the anniversary date. 30 U.S.C. § 188(b) (1976). The Secretary of the Interior may reinstate oil and gas leases which have terminated for failure to pay rental timely only where the rental is paid within 20 days and upon proof that such failure was either justifiable or not due to a lack of reasonable diligence. 30 U.S.C. § 188(c) (1976). The rental payments for leases M 47790(SD) and M 47794(SD) were not so paid, consequently each terminated by operation of law, and I would affirm the BLM decision.

As I read the majority opinion, the filing of the partial assignments creates an interest in the leases which may not be defeated where the leases sought to be assigned have terminated. It reaches this conclusion based on Jones-O'Brien, Inc., 85 I.D. 89 (1978).

A noncompetitive oil and gas lease normally expires at the end of its primary term in the absence of either production or diligent drilling operations. 30 U.S.C. § 226(e) (1976). A lease which might otherwise terminate can be preserved by suspension. 30 U.S.C. § 226(f) (1976). The Secretary is authorized by statute to suspend oil and gas leases. 30 U.S.C. § 209 (1976). Accordingly, considering his authority under 30 U.S.C. § 209 to suspend a lease, the Secretary in Jones-O'Brien, Inc., supra, concluded that the filing of an application for suspension prior to the expiration date of the lease could be viewed as preserving the Department's right to act on the request. I do not agree that the filing of an assignment similarly preserves in the Department a right to act on an assignment where a lease terminated, because the lessee of record failed to pay the rental payments due under the lease terms.

30 U.S.C. § 187 (1976) states that Federal oil and gas leases may not be assigned except with permission of the Secretary. 30 U.S.C. § 187a (1976) provides in part:

> Notwithstanding anything to the contrary in section 187 of this title, any oil or gas lease issued under the authority of this chapter may be assigned or subleased, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein, to any person or persons qualified to own a lease under this chapter, and any assignment or sublease shall take effect as of the first day of the lease month following the date of filing in the proper land office of three original executed counterparts thereof, together with any required bond and proof of the qualification under this chapter of the assignee or sublessee to take or hold such lease or interest therein. Until such approval, however, the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed.

Approval of an assignment must relate back to a lease in existence. When the proper forms were filed by appellant there were leases which could be assigned, however, prior to the time the assignments were considered by BLM the leases were allowed to terminate. This being the case, BLM had no alternative but to reject the assignments, because the interest sought to be assigned no longer existed.

The effect of the majority holding would require the Department to recognize the existence of a potential assignee's interest upon the filing of an assignment and a right to separate that interest from the lease thereby relieving the lessee of record of his responsibilities under the terms of the lease without approval of the assignment by the Secretary. Such a position is not supported by the applicable statutory provisions, 30 U.S.C. § 187 (1976), supra, which dictates that assignments of oil and gas leases become effective only after approval of the Secretary. Neither do the regulations nor prior decisions issued by this Board envision this result.

43 CFR 3106.2-3(b) provides:

> (b) Continuing responsibility. The assignor or sublessor and his surety will continue to be responsible for the performance of any obligation under the lease until the assignment or sublease is approved. If the assignment or transfer is not approved, their obligations to the United States shall continue as though no such assignment or transfer had been filed for approval. After approval the assignee or sublessee and his surety will be responsible for the performance of all lease obligations notwithstanding any terms in the assignment or sublease to the contrary.

In William G. Beanland, 21 IBLA 66, 67 (1975), we said: "Section 30 of the Mineral Leasing Act of February 25, 1920, 30 U.S.C. § 187 (1970), requires that an assignment of all or any part of a lease be approved by the Department before any assignee becomes record holder of any interest therein." Earlier, in Amoco Production Co., 16 IBLA 215, 220 (1974), we said:

> An assignee or sublessee of all or part of an oil or gas lease does not become the record holder of any interest therein until his assignment or sublease has been approved by the Bureau of Land Management. Section 30a of the Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 187a (1970), provides that until approval "the assignor or sublessor and his surety shall continue to be responsible for the performance of any and all obligations as if no assignment or sublease had been executed. * * *" Since the assignment to Amoco was unapproved by the Montana State Office on the anniversary date of the lease, Amoco was not a record holder of title under the lease at the time the payment of the rental fell due on August 1, 1973, and hence was not responsible to the Government for the performance of any obligation thereunder. Pending approval of the assignments on file, the only lessees of record were the assignors, Inexco and Planet.

> See Lester C. Hotchkiss, A-27342 (August 14, 1956). The fact that Amoco, in apparent anticipation of approval of its interest in the lease, made a deficient rental payment did not relieve Inexco and Planet of their obligation timely to remit the balance due, or confer upon Amoco any rights under the lease. As a stranger to the lease at all times prior to its termination, Amoco was not required to be notified of the inclusion of a portion of the leasehold within a KGS, or of the fact that the lease payment which it had tendered was insufficient.

Consistent with this position that a potential assignee has no cognizable interest in a lease we held in Grace Petroleum Corp., 62 IBLA 180 (1982), that such an assignee could not petition for reinstatement of a lease.

Until the Secretary approves an assignment, the assignee is a nonentity, with no rights or interest which may be recognized. See 30 U.S.C. § 187a (1976). If full rental is not paid to preserve the life of the lease until the assignment is approved, the lease terminates, and with it the expectation of the potential assignee. Accordingly, I would affirm the BLM decision.

_____
Gail M. Frazier
Administrative Judge